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THE KROGER COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CHERIE L. MOORE,

Plaintiff and counterclaim defendant,

vs.

THE KROGER COMPANY,

Defendant and counterclaimant.

Case No. 4:13-CV-04171-DMR

OPPOSITION TO PLAINTIFF'S
ADMINISTRATIVE MOTION TO
CONSIDER WHETHER CASES
SHOULD BE RELATED

Magistrate Judge Donna M. Ryu

Complaint Filed: September 9, 2013

1 I. INTRODUCTION.

2 The Kroger Company (“Kroger”) respectfully requests that the Court deny Cherie L.
 3 Moore’s (“Moore”) Administrative Motion to Consider Whether Cases Should be Related,
 4 dated December 9, 2013 (the “Motion”), seeking relation of *Cherie L. Moore v. Costco*
 5 *Wholesale Corporation*, Case No. 3:13-cv-04165 (the “Costco case”), *Cherie L. Moore v.*
 6 *The Rite Aid Corporation*, Case No. 5:13-cv-04170 (the “Rite Aid case”), and *Moore v.*
 7 *Kroger*, Case No. 4:13-cv-04171 (the “Kroger case”) (collectively, the “Three Cases”).
 8 Moore’s Motion should be denied because the requirements of Local Rule 3-12(a) are not
 9 met.¹

10 II. ARGUMENT.

11 Cases are not related unless they “concern substantially the same parties, property,
 12 transaction, or event.” L.R. 3-12(a)(1). It must also appear “likely that there will be an
 13 unduly burdensome duplication of labor and expense or conflicting results if the cases are
 14 conducted before different Judges.” L.R. 3-12(a)(2). Moore’s Motion fails to establish that
 15 either requirement is met here.

16 A. The Three Cases do not “concern substantially the same parties, property,
 17 transaction or event.”

18 Moore’s Motion asserts that the Rite Aid and Kroger cases are “essentially related
 19 to the same events of [the Costco] case.” Motion, at 1:8. But that is not correct. In fact,
 20 the Three Cases are unrelated – and do not “relate[] to the same events” – for at least the
 21 following reasons:

- 22 • The Three Cases involve unrelated defendants – the only overlap among the
 23 parties in these cases is Moore;
- 24 • Moore does not allege that any defendant has acted in concert with or

25 _____
 26 ¹ In addition, the Motion should be denied because Moore’s service of the Motion on
 27 Kroger was untimely and defective under Local Rules 3-12(b) and 7-11. Although Moore
 28 filed her Motion on December 9, 2013, she did not serve her Motion upon Kroger until
 9:08 p.m. on December 11, 2013.

1 induced any other defendant to infringe her asserted copyrights;

- 2 • Moore does not allege that the defendants' products accused of copyright
- 3 infringement are related in any way;
- 4 • The alleged issues of infringement and damages are distinct as to each
- 5 defendant (e.g., different timelines, witnesses, sales volumes, etc.), and
- 6 Moore does not explain how relating the cases would promote judicial
- 7 economy or efficiency for those issues.

8 Presumably, Moore is relying on the fact that she has asserted the same alleged
 9 copyright registration against the defendants in the Three Cases. This is not a sufficient
 10 basis for relating cases. Rather, the weight of authority favors maintaining separate actions.
 11 For example, in *Evolutionary Intelligence LLC v. Yelp Inc.*, No. 4:13-cv-03587 DMR (N.D.
 12 Cal. Oct. 8, 2013), the court denied a motion to consider whether cases should be related
 13 because although same patent was at issue in the several cases, each case involved different
 14 defendants and products. *See id.*, at Dkt. Entry No. 82; *see also WiAv Networks, LLC v.*
 15 *3Com Corp.*, No. C 10-03448 WHA, 2010 WL 3895047, at *1, 3-4 (N.D. Cal. Oct. 1, 2010)
 16 (in holding that defendants were misjoined in a case where a common patent was asserted,
 17 the Court cited L.R. 3-12(a) and stated: "Given the disparity in defendants, accused
 18 products, and other disparate issues discussed herein like damages, willfulness, and
 19 discovery supervision, it is worth adding that the allegations against each remaining
 20 defendant would not be related under our civil local rules even if brought here as separate
 21 actions.") (emphasis added).

22 B. Proceeding separately will not cause undue burden or conflicting results.

23 The Motion also fails to explain why "it appears likely that there will be an unduly
 24 burdensome duplication of labor and expense or conflicting results if the cases are
 25 conducted before different judges" as required by Local Rule 3-12(a)(2). While Kroger
 26 obviously agrees that conserving judicial and party resources is a critical goal, as noted
 27 above, each of these cases concerns different defendants with different products. Although
 28

there will likely be some overlap with respect to the validity of Moore's alleged copyright registration (and this is the subject matter of motion practice in two of the three cases), each case may require a unique inquiry to assess alleged infringement and damages with respect to each individual defendant. There is a material danger of confusing issues and a danger of complicating the case schedule(s) by relating these cases. Thus, even if there were common validity issues in the Three Cases, those issues are insufficient to justify relating the cases as it is unlikely that relation would avoid duplication of labor and expense, or cause conflicting results.

III. CONCLUSION.

For the reasons above, Moore's Motion should be denied.

Dated: December 13, 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 13, 2013, a true and correct copy of the foregoing Opposition to Plaintiff's Administrative Motion to Consider Whether Cases Should be Related is being served to the following party via electronic mail pursuant to Civil Local Rule 5-1(h):

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